

Kuala Lumpur Hilton v National Union of Hotel, Bar & Restaurant Workers

HIGH COURT (KUALA LUMPUR) – ORIGINATING MOTION
NO A30 OF 1984
WAN HAMZAH SCJ
28 OCTOBER 1988

Administrative Law – Order of certiorari to quash Industrial Court award – Application for – Trade dispute on warning letter issued by applicant to employees – Industrial Court made award in favour of respondent union – Whether Industrial Court acted without jurisdiction when deciding on matter not referred to in reference made by Labour Ministry – Whether award was ultra vires s 30(4) & (5) of Industrial Relations Act 1967 – Whether Industrial Court had made findings against weight of evidence – Findings of Industrial Court on matters of fact cannot be called in question in High Court – Industrial Relations Act 1967, s 30(4), (5) & (6)

A group of butlers working in the applicant's hotel went on medical leave after failing to obtain the applicant's assurance that they would not be questioned by the police subsequent to an unpleasant incident involving the loss of some personal valuables from a hotel guest. The butlers were then given a show cause letter by the applicant stating that they had committed a serious misconduct under the Industrial Relations Act 1967 amounting to an illegal strike and that they were suspended from work on half pay until further order. Eventually a domestic inquiry was held and a warning letter was issued by the applicant. The trade dispute between the applicant and the butlers, who were represented by the respondent union, was then referred to the Industrial Court by the Ministry of Labour. The Industrial Court made an award in favour of the respondent union. The applicant then applied for an order of certiorari to quash the award of the Industrial Court.

In its application against the Industrial Court's award, the applicant contended that (a) the Industrial Court had no jurisdiction to consider and decide on the dispute relating to the suspension and half pay as the letter from the Ministry of Labour conveying the reference to the Industrial Court mentioned a single specific issue only, ie the dispute relating to the warning letter; (b) the Industrial Court acted ultra vires s 30(4) and (5) of the Industrial Relations Act 1967; and (c) the Industrial Court had ignored certain evidence adduced by the applicant and had made findings against the weight of the evidence.

Held, dismissing the application:

(1) The Industrial Court had jurisdiction under s 30(6) of the Industrial Relations Act to consider and decide on the dispute relating to the suspension and half pay. It was expedient for the Industrial Court to dispose of this aspect of the dispute in order to save time and costs for all concerned in having to go through another separate inquiry.

(2) Although in the letter from the Ministry of Labour to the Industrial Court no mention was made of the dispute relating to the suspension on half pay, it was implicit that the reference covered also that dispute. The implication was that the reference of the dispute relating to the letter of warning issued by the applicant included also a reference of the dispute on wages and suspension, as no mention was made in the warning letter of any change in the previous decision of the management on suspension implying that this previous decision was confirmed.

A (3) It was not shown how anything contained in the award was ultra vires. There was nothing to show that the Industrial Court had failed to have regard to the public interest or to the effect of the award on the economy of the country or on the industry. There was nothing to show that the Industrial Court had failed to act according to equity and good conscience.

B (4) Under s 33B of the Industrial Relations Act, the decision of the Industrial Court on matters of fact was to be final and conclusive and could not be called in question in the High Court. The Industrial Court had not addressed the wrong questions or taken into account irrelevant matters. It had considered all matters which ought to have been taken into account.

Legislation referred to

C Employment Act 1955 ss 14, 69(3)
Industrial Relations Act 1967 ss 30(4), (5), (6), 33B

TM Varughese for the applicant.

KP Gengadharan (N Mahalingam with him) for the respondent.

D *Cur Adv Vult*

Wan Hamzah SCJ: The Minister of Labour referred to the Industrial Court a trade dispute between the Kuala Lumpur Hilton and the National Union of Hotel, Bar & Restaurant Workers. The Industrial Court made an award ie Award No 104 of 1984, in favour of the union. E Now the Kuala Lumpur Hilton applies to this court for an order of certiorari to remove that award into this court for the purpose of its being quashed. The following are some of the facts stated by the Industrial Court in the award. An international conference hosted by the Malaysian government was held in the Kuala Lumpur Hilton F Hotel from 2 to 7 May 1983. On 4 May 1983 one of the delegates reported the loss of some personal valuables from her room. On 5 May 1983 the room butler was detained by the police for questioning but was released the same evening. A group of butlers were unhappy with the unpleasant incident and asked for an assurance from G the management that they would not be questioned or detained by the police in connection with the same matter. The Kuala Lumpur Hilton was unable to give such an assurance. On 6 and 7 May 1983, sixteen butlers went on medical leave and they were covered by medical certificates issued either by the Kuala Lumpur Hilton's H doctor, the government medical officer or private medical practitioners.

I On 7 May 1983 each of them was given a show cause letter why disciplinary action should not be taken against him. In the letter it was alleged that each of them had failed to report for duty in combination with other butlers and that such failure was a serious misconduct under the Industrial Relations Act amounting to an illegal strike. Each of them was informed by the letter that he was suspended from work on half pay with effect from 7 May 1983 until further order. Eventually a domestic inquiry was held and the finding of the panel of inquiry

was that all of the 16 butlers were guilty of having acted jointly under a common understanding on refusal to report for work, in protest against police action and the management's alleged inaction, which was considered an illegal strike. On the basis of that finding the management issued to each of the butlers a warning letter in the following terms:

The management is satisfied that your act amounts to a serious misconduct which warrants dismissal. However, the management has decided not to impose the said punishment this time but to place on record and serve you this letter as a serious warning. You are hereby advised to treat this warning with full seriousness that it deserves. Should you commit any further misconduct, please note that it will not be treated lightly by the hotel. You are advised to report for duty with effect from 24 May 1983.

The Industrial Court stated its findings and decisions as follows:

We would have agreed with the hotel's contention if the claimants (the butlers) feigned illness, left their place of employment under the pretext of going for medical treatment and returned to work without medical certificates to cover the period of their absence, or if they had obtained medical certificates by false pretences. It will then be an act of serious misconduct which justifies disciplinary action. But here the claimants concerned did go for medical treatment – two to the company's doctor, one to the government medical officer and seven to the private registered medical practitioners. They were each given a medical certificate to the effect that they were medically unfit for work for the period of their absence. Their medical certificates were neither questioned nor challenged and were accepted as genuine. This is a fact before us and not a conjecture or presumption. In such a case, although the claimants did not comply with the hotel's normal procedure of seeking medical treatment, nevertheless their absence from work on the days in question was not without justification or without reasonable excuse. If their absence is justified, then, in our view, it cannot be construed as a strike, be it illegal or otherwise. Under such circumstances, we hold that the suspension of the claimants were unjustified and the warning letters issued, unwarranted. We, therefore, order that the warning letters issued to them be rescinded and that they be paid their full wages for the period from 7 May 1983 to 20 May 1983.

The Kuala Lumpur Hilton has submitted five grounds to support its application to this court for an order of certiorari. I find that there is no merit in any of the grounds. I shall now deal with each of the grounds.

The following is the first ground: 'The Industrial Court acted in excess and without jurisdiction in making the order it did, without having regard to the reference made by the Honourable Minister dated 20 October 1983 on a single specific issue only.' The letter from the Ministry of Labour conveying the reference to the Industrial Court reads as follows:

YB Menteri Buruh telah memutuskan bahawa pertikaian di antara kedua-dua pihak tersebut di atas mengenai surat

amaran kepada 16 orang pekerja dirujuk ke Mahkamah Perusahaan di bawah seksyen 26(2) Akta Perhubungan Perusahaan 1976, untuk satu keputusan.

It was submitted that the decision to suspend the butlers on half pay was made pursuant to s 14 of the Employment Act 1955, and that if they were aggrieved by that decision they should have applied to the Director General of Labour to take action under s 69(3) of the Employment Act. It was submitted that the Industrial Court had no jurisdiction to consider and decide on the dispute relating to the suspension and half pay. In my judgment the Industrial Court had such jurisdiction under s 306 of the Industrial Relations Act 1967, which reads:

In making its award, the court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under section 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3).

In my judgment it was expedient for the Industrial Court to dispose of the dispute relating to the suspension on half pay in order to save time and costs for all concerned in having to go through another separate inquiry.

Although in the letter from the Ministry of Labour to the Industrial Court no mention was made of the dispute relating to the suspension on half pay, it is implicit that the reference covered also that dispute. The letter of warning referred to the finding of the panel of inquiry and it conveyed the decision of the management on the basis of the finding. It gives the impression that the decision was the final decision on all the relevant aspects given after a full inquiry. In it no mention was made of any change in the previous decision of the management in the same matter, ie the decision to pay half wages only for the period from 7 May 1983 to 20 May 1983 and this implied that the previous decision regarding the wages was confirmed, and this in turn raised a dispute as to the wages as well. Thus the implication is that the reference of the dispute relating to the letter of warning included also a reference of the dispute on the wages and suspension.

The Kuala Lumpur Hilton's second ground to support its application for an order of certiorari is that the Industrial Court in making its award acted ultra vires s 30(4) and (5) of the Industrial Relations Act. But it was not shown how anything contained in the award was ultra vires. There was nothing to show that the Industrial Court had failed to have regard to the public interest or to the effect of the award on the economy of the country or on the industry. There was nothing to show that the Industrial Court had failed to act according to equity and good conscience.

Other grounds to support the application are that the Industrial Court had ignored certain evidence adduced by the Kuala Lumpur Hilton and had made findings against the weight of the evidence. But these matters are purely matters of fact and under s 33B of the Industrial Relations Act the decision of the Industrial Court on such matters shall be final and conclusive and cannot be called in question in the High Court. Moreover I find that the Industrial Court had not addressed the wrong questions or taken into account irrelevant matters. I find that it had considered all matters which it ought to have taken into account.

The application is dismissed with costs.

Application dismissed.

Solicitors: *TM Varughese & Co; Aziz Abdullah & Co.*

Reported by *Ng Sheau Jiuan*

Yap Sooi Kim v Public Prosecutor

HIGH COURT (KUALA LUMPUR) – FEDERAL TERRITORY
CRIMINAL APPLICATION NO CR 54-7-88
ANUAR J
5 SEPTEMBER 1988

Criminal Procedure – Bail pending trial – Dangerous drugs – Offence punishable with imprisonment for more than five years – Punishment that ‘may be imposed’ and ‘can be imposed’ by court – Dangerous Drugs Act 1952, ss 39A(2) & 41B(1)(b)

This was an application for an order for bail pending trial. The applicant who was charged with an offence under s 39A(2) of the Dangerous Drugs Act 1952 was refused bail by the sessions judge. In this application she submitted that the court below was erroneously of the view that the offence was non-bailable and contended that the offence was not one which fell within the ambit of s 41B(1)(b).

Held, dismissing the application:

(1) Counsel for the applicant failed to distinguish between punishment that may be imposed and punishment that can be imposed by the court. The punishment that may be imposed is the punishment which the court may decide to impose on the accused after taking into consideration the seriousness of the offence, the antecedent and mitigating factors present. The punishment that a court can impose relates to the power the court has. Under s 39A(2) of the Act the court can impose any punishment between a minimum period of five years and imprisonment for life.

(2) The operative words under s 41B(1)(b) are ‘punishable with imprisonment’. This phrase means the power of punishment which the court has under the law and not the punishment which the court may choose to impose.

Legislation referred to
Dangerous Drugs Act 1952 ss 39A(2), 41B(1)(b)

A *PG Segran* for the applicant.
B *Tan Poh Lai (Miss)* (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

B **Anuar J:** This is an application by the applicant for an order that she be granted bail pending trial.

The applicant was arrested on 29 September 1987 at about 10.30 am at her house at No 286-G, Sentul Pasar, Kuala Lumpur, after the police found some drugs in the premises. She was subsequently charged with an offence under s 39A(2) of the Dangerous Drugs Act 1952 (‘the Act’). On 23 March 1988, she applied for bail pending trial but her application was refused by the learned judge of the Sessions Court.

In her affidavit in support of the application, the applicant stated that the learned judge of the Sessions Court refused to grant bail as the learned judge was of the view that an offence under s 39A(2) of the Act is non-bailable. Such a view, it was submitted by the learned counsel for the applicant, was erroneous. He contended that the present offence is not one which falls within the ambit of s 41B(1)(b) of the Act, that is, the section which relates to bail.

Section 41B(1)(b) reads as follows:

- (1) Bail shall not be granted to an accused person charged with an offence under this Ordinance –
- ...
 - where the offence is punishable with imprisonment for more than five years; or
 - ...
- (2) The provisions of subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.

G It was submitted by counsel that under s 41B(1)(b), bail should be refused only in cases wherein the punishment is more than five years. As the offence under s 39A(2) of the Act carries a minimum sentence of only five years, counsel submitted that it can only mean that the accused may be punished with an imprisonment term of only five years and not more. Accordingly, s 41B(1) cannot apply.

H It would appear from counsel’s interpretation of s 41B(1)(b) that he failed to distinguish between punishment that may be imposed and punishment that can be imposed by the court. The punishment that may be imposed is the punishment which the court may decide to impose on the accused after taking into consideration the seriousness of the offence, the antecedent and mitigating factors present. The punishment that a court can impose relates to the power the court has. Under s 39A(2) of the Act, the court can impose any punishment between a minimum period of five years and imprisonment for life.